FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1958

No. [redacted] 194

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY & AGRICULTURAL & MECHANICAL COLLEGE, ET AL.,
Petitioners,

versus

ARNEASE LUDLEY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Attorney General,
State of Louisiana;
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First Assistant Attorney General
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WILLIAM C. BRADLEY,
Special Counsel to the Attorney
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WILLIAM P. SCHULER,
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LAURANCE W. BROOKS,
Attorney for Louisiana
State University.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Mrs. Marguerite Dixon; Lewis Gottlieb; Sterling Gladden; George Baillo; Theodore Cangelosi; John J. Doles; C. J. Dugas; Tom Dutton; Thomas W. Leigh; Joseph C. Lesage; Joseph Smitherman; Horace Wilkinson, Jr.; Percy L. Roberts; Mrs. Ella V. Aldrich Schwing; Members of the Board of Supervisors; Troy H. Middleton, President of the University; and R. J. Russell, Dean of the Graduate School of the University pray that a Writ of Certiorari issue to

review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 13, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion and decree of the United States District Court for the Eastern District of Louisiana, Honorable Herbert W. Christenberry and J. Skelly Wright presiding, rendered and entered on April 15, 1957, are reported in 150 Fed. Supp. 900 and are printed in Appendix "B" hereto, page 20, *et seq.* The opinion and decree of the United States Court of Appeals for the Fifth Circuit rendered and entered on February 13, 1958, are reported in 252 Fed. 2d 372 and are printed in Appendix "B" hereto, page 30, *et seq.* The order of the United States Court of Appeals for the Fifth Circuit denying a rehearing is printed in Appendix "B", page 42.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 13, 1958 (Tr. p. 164). Rehearing was denied on March 28, 1958 (Tr. p. 179). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED.

1. May a suit be filed against the State Agency even though the sovereign state has specifically withdrawn consent to sue said agency?

2. In order to fall under the exception to the 11th Amendment set forth in *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908),

must the plaintiff sue as parties defendant persons charged with enforcement of the statute claimed to be unconstitutional?

3. May a single judge of the Federal Court issue a preliminary injunction restraining the enforcement of a state statute on grounds of unconstitutionality even though prohibited from doing so by a federal statute?

4. Is the law of Louisiana requiring a Certificate of Eligibility in order to be admitted to a publicly financed institution of higher learning contrary to the 14th Amendment?

5. May a Court use statements of certain legislators made after passage of a bill to determine the legislative intent in passing of a specific act?

6. May new named parties intervene in a class action when the named plaintiff is found ineligible to bring the suit?

7. May a Federal District Judge waive the mandatory provision that a plaintiff must furnish bond in order that the Court may issue a preliminary injunction?

STATUTES INVOLVED.

Constitution of the State of Louisiana, Article XIX, Section 26, withdrawing consent to suit against the Board of Supervisors of Louisiana State University. Act 15 of 1956 (R. S. 17:2131-2135) requiring a Certificate of Eligibility in order to enroll at a state financed institu-

tion of higher learning. Act 249 of 1956 (R. S. 17:443) Teacher Tenure Act; all of which are printed herein in Appendix "A" at page 15, *et seq.*

STATEMENT.

Arnease Ludley filed a complaint in the United States District Court for the Eastern District of Louisiana, on January 17, 1957, against the Board of Supervisors of Louisiana State University & Agricultural & Mechanical College, the individual members of the board, the president of this university, Troy H. Middleton, and R. J. Russell, Dean of the Graduate School, erroneously referred to as Dean of the University, seeking a temporary restraining order and preliminary and final injunctions to restrain the enforcement by officers of the State of Louisiana, of certain Louisiana statutes, to-wit: Louisiana Revised Statutes 17:443 and Revised Statutes 17:2131-2135, inclusive. In this complaint she alleged that the aforesaid statutes were contrary to the Fourteenth Amendment of the United States Constitution in that said statutes deprived her and others similarly situated of rights, privileges and immunities secured by the Constitution and laws of the United States, to-wit: Rights secured by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and Title 42, U.S.C., Section 1981; wherefore she prayed that a temporary restraining order issue enjoining Defendants from denying her the right to register at L.S.U. She further prayed that a three-Judge court be convened as required by Title 28, U.S.C., Secs. 2281-2284, and that a hearing be held to determine whether a preliminary and permanent injunction should issue, enjoining defendants and their

agents from refusing plaintiff's registration for the forthcoming semester at L.S.U. (Tr. pp. 2-9) and that Louisiana Revised Statutes 17:2131-2135 (Act 15 of 1956) and Louisiana Revised Statutes 17:443 (Act 249 of 1956) be found in violation of due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

On January 17, 1957, District Judge Herbert W. Christenberry issued a temporary restraining order enjoining defendants from refusing to register plaintiff and others similarly situated at Louisiana State University until the hearing on said application for interlocutory injunction, and this temporary restraining order was extended from time to time until judgment on the interlocutory injunction. (Tr. pp. 16, 51, 100, 105, 106, 107, 108, 109, 112).

A hearing on the interlocutory injunction was had on February 8, 1957, at which time appellants filed a motion to dismiss and alternatively for a stay of proceedings, based on lack of jurisdiction of the court and the plaintiff's failure to state a claim upon which relief could be granted and suggested to the court that this matter should be held in abeyance until such time as the courts of Louisiana had time to pass upon the validity of the state's statutes attacked herein. (Tr. pp. 18, 19, 20).

Appellants then filed their answer in the matter denying that the state statutes in question were contrary to or in violation of plaintiff's constitutional rights, and alleged further that plaintiff had failed to meet scholastic

requirements which would qualify her for readmission in the University. (Tr. pp. 30-36).

Appellants, in support of their position, filed affidavits of university officials which showed conclusively that the named plaintiff herein had failed to meet the scholastic standards of the university, and further that the university had applied the Certificate of Eligibility requirement uniformly to white and negro students seeking admission for the Spring Semester of 1957. As a matter of fact, affidavit showed that in excess of 150 white students had been denied admission to the university because of inability to produce required Eligibility Certificate. (Tr. pp. 22-30, 37-48).

At this point the Court consolidated this case with the cases of Bailey v. Louisiana State Board of Education, *et al.*, and Lark v. Louisiana State Board of Education, *et al.* (Tr. p. 49).

The Court heard argument of counsel on this and consolidated cases and reserved judgment thereon allowing both sides the opportunity to file memorandum in support of their position within twenty (20) days. (Tr. p. 50).

On February 18, 1957, Audrey C. Robertson, Alvery L. Darnum and Ruth Mae Johnson filed a motion to intervene as plaintiffs in this suit. (Tr. p. 98).

Appellants on February 27, 1957, filed an opposition to the intervention (Tr. pp. 101-102), however, on April 15, the Court allowed the intervention of the new plaintiffs (Tr. p. 113).

On April 15, 1957, the Court in its opinion held that Acts 249 and 15 of 1956 were unconstitutional in that they deprived plaintiffs of their constitutional guarantees. (Tr. pp. 114-121).

In conformity with said opinion, the Court issued a temporary injunction restraining defendants from refusing to admit any qualified applicant to Louisiana State University for the purpose of pursuing a course of study offered by that university because of failure of the applicant to present the Certificate of Eligibility provided in Louisiana Revised Statutes 17:2131-2135. Application for new trial and rehearing was filed on behalf of the appellants predicated on ten separate allegations of error on the part of the District Court. (Tr. pp. 123-126). This motion was denied on May 20, 1957 (Tr. p. 127).

Having exhausted all remedies before the lower Court, appellants on May 29, 1957, filed a notice of appeal (Tr. p. 128), filed the necessary bond for costs (Tr. pp. 130-133) and on June 6, 1957, designated in writing to the Clerk of Court that the entire record was to be issued on appeal (Tr. pp. 132-133).

After the submission of briefs and oral argument Circuit Judges Hutcheson, Tuttle and Jones, on February 13, 1958 issued their opinion and entered judgment affirming the decision of the District Court (see Tr. pp. 153-164 and appendix hereto). Thereafter, petitioners filed a petition for rehearing on March 5, 1958 (Tr. pp. 165-168). On March 28, 1958 the Court entered an order denying the petition for rehearing (Tr. p. 179).

REASONS FOR GRANTING WRIT.

I.

The decree of the Court of Appeals affirming the District Court in refusing to dismiss this suit against an agency of the State is in violation of the 11th Amendment of the United States Constitution. One of the defendants named in this suit was the Board of Supervisors of the Louisiana State University. This agency under the provisions of Article 19, Section 26 of the Constitution of the State of Louisiana is designated as an agency of the State and, further, said constitutional provision specifically withdraws the consent of the state to suit against said agency. The preliminary injunction granted herein is specifically directed against said agent of the state as well as other parties and thereby makes this injunction an injunction against the State of Louisiana through its lawful agent.

If this decision is followed to its logical conclusion there would be no prohibition against a suit directly against the state, instead of its authorized agent.

II.

The decree of the Court of Appeals affirming the District Court in refusing to dismiss this suit as one against the state prohibited by the 11th Amendment is in direct conflict with the opinion of the Supreme Court in *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

While that decision did hold that a state officer may be sued in his individual capacity and restrained from enforcing an unconstitutional law, it limited the scope of

the decision to the extent that the officer or officers sued must have some connection with the enforcement of the statute or the suit is one against the state and prohibited by the 11th Amendment.

The Court of Appeals in its opinion (Tr. p. 155) stated that the power reposed in two officials, the high school principal and the parish school superintendent. Neither of these two officials was made defendant in this suit. The plaintiffs merely sued every other state official who had any connection with the institution of higher learning regardless of the fact that they had no power to enforce the act sought to be declared unconstitutional.

Further the other act (249 of 1956) which was attacked on constitutional grounds was an act which was enforced entirely and solely by local school board officials and over which the defendants in this suit have no enforcement power, and further, not even the slightest connection therewith.

The failure of the plaintiffs herein to sue the proper parties defendant makes this suit completely and unalterably a suit against the State of Louisiana and as such prohibited by the 11th Amendment to the United States Constitution.

III.

The decree of the Court of Appeals affirming the District Court in refusing to convene a three-judge Court is in direct conflict with the mandatory provisions of 28 U. S. C. 2281.

Since the jurisdiction of the Federal District Court is controlled by Congress and Congress in its wisdom has enacted a statute prohibiting any District Court or Judge thereof from issuing an interlocutory injunction restraining the action of an officer of the state upon grounds of unconstitutionality of a statute it is seriously contended that the District Court was without jurisdiction to issue the injunctive relief.

The District Court in this matter apparently felt that the statute or statutes involved herein were unconstitutional. It, therefore, felt that it could waive the mandatory provision of federal law and confer upon itself jurisdiction which the Congress of the United States had specifically withheld.

IV.

The Court of Appeals found that Act 15 of 1956 was repugnant to the due process clause of the 14th Amendment to the United States Constitution. It is difficult to see how such statute could in any manner deprive the plaintiffs of either their life or liberty, even if the plaintiffs had offered proof of such deprivation, which they did not. Further, the plaintiffs were not deprived of any property, since an education in any particular state institution of higher learning is not a property right to which any person is entitled but a mere privilege conferred by the State.

Waugh v. University of Mississippi, 237 U. S. 589, 59 L. Ed. 1131, 35 S. Ct. 729; 55 Am. Jur. 10.

Clearly the plaintiffs herein set forth no cause of action which would allow them to invoke due process laws of the 14th Amendment.

The District Court found Act 15 of 1956 in violation of the due process clause of the 14th Amendment to the United States Constitution. It appears from the record that the plaintiffs do not contend that the statute was administered unfairly or in a discriminatory manner by any of the parties named defendant herein or even anyone restrained by the District Court injunction.

Apparently the contention upon which plaintiffs rely is the allegation that the principals or school superintendents of the respective parishes, have established a mode of determining eligibility, that is based upon color as a standard. If this should be true, then these officials are establishing standards which are not contained in the Act in question, and the plaintiffs' remedy should be a suit against these officials rather than the defendants in this action.

V.

The trial judge in arriving at his decision weighed heavily certain statements made by a legislator or legislators as to the intent of the legislation (Tr. p. 118), despite the fact that these statements issued after the statutes involved had already passed both houses of the legislature.

The case of *Davis v. Schnell*, 81 F. Supp. 872 (D. C., S. D. Ala., 1949), relied on by both Courts in their opinions is not opposite herein. In that case the court took into consideration speeches and editorials which were published in order to inform the public what the constitutional amendment they were voting on was designed to accomplish.

In the case at bar the statements were made after passage of the act and not in an attempt to obtain votes for passage.

It would indeed be a dangerous precedent to permit the courts to consider statements of a member of a legislative body made after the passage of a bill, in order to determine what the intention of the legislative body was in passing the legislation.

VI.

This suit was originally filed on behalf of Arnease Ludley, the only named plaintiff and unnamed members of the class she represented.

Affidavits introduced on the day of the hearing showed conclusively that the only named plaintiff was not eligible scholastically to continue her studies at the university (Tr. pp. 37-48).

Under the doctrine set forth in *Cook v. Davis*, 178 F. 2d 595 (C. C. A. 5, 1950) the suit should have fallen at this point since the only named plaintiff in the class action had failed to make out a case. See also *Bantel v. McGrath*, 215 F. 2d 297 (C. C. A. 10, 1954).

Ten days after the hearing afforded to defendants three new named parties sought to intervene, alleging that they were members of the class represented by the plaintiff (Tr. pp. 98, 99). This intervention merely adopted the allegations of the original petition and did not conform to Rule 24(c) (F. R. C. P.).

This procedure of intervention further placed defendants in the unenviable and untenable position of being afforded a hearing under Rule 65(a) (F. R. C. P.) insofar as the only named plaintiff was concerned, but having judgment rendered against them on behalf of parties who were permitted to enter by name only upon the day the trial judge rendered judgment (Tr. p. 113).

Such a practice if permitted to continue would allow hidden and unnamed parties to control law suits and create a situation where the trial of a law suit would only be the initial skirmish rather than a determination of the rights of litigants in the trial court.

VII.

The decree of the Court of Appeals in affirming the action of the District Court in issuing a preliminary injunction without requiring bond therefor is in direct conflict with the mandatory provisions of Rule 65 (c) (F. R. C. P. as well as the decision of *Chatz v. Freeman, et al.*, 204 F. 2d 764 (C. C. A. 7, 1953)).

In the event that this opinion should become the interpretation given to Rule 65 (c) the District Court Judge would not only have the right to determine the amount of the security bond, but would in his discretion be able to decide whether or not any bond whatsoever would be necessary. It is seriously argued that this is contrary to and in violation of the clear language and intent of Rule 65 (c).

CONCLUSION.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana;
GEORGE M. PONDER,
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WILLIAM C. BRADLEY,
Special Counsel to the Attorney
General of Louisiana;
WILLIAM P. SCHULER,
Assistant Attorney General for
the State of Louisiana;
LAURANCE W. BROOKS,
Attorney for Louisiana
State University.

PROOF OF SERVICE.

I, WILLIAM P. SCHULER, one of the attorneys for petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on A. P. Tureaud, Esquire, Counsel for respondents, by mailing a copy thereof, postage prepaid, addressed to his office at 1821 Orleans Avenue, New Orleans, Louisiana.

Dated this ____ day of June, 1958.

WILLIAM P. SCHULER,
Assistant Attorney General for the
State of Louisiana.

APPENDIX "A".

CONSTITUTION, STATE OF LOUISIANA, 1921, ARTICLE XIX, SECTION 26.

Section 26. The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:

(1) The State Parks Commission of Louisiana,

(2) The Recreation and Park Commission for the whole Parish of East Baton Rouge,

(3) All recreation districts created under terms of Article XIV, Section 14 (d-4) of this Constitution;

(4) Any municipal corporation, parish or subdivision of the State in matters respecting the operation or maintenance of parks and other recreational facilities or in connection with any rule or regulation applicable thereto,

(5) The State Board of Education,

(6) The Board of Supervisors of Louisiana State University & Agricultural & Mechanical College,

(7) The parish school boards of each of the parishes of the State of Louisiana,

(8) The school boards of the municipalities of Monroe in Ouachita Parish and Lake Charles in Calcasieu Parish, and Bogalusa in Washington Parish,

(9) The State Superintendent of Public Education in his capacity as such as well as in the capacity of ex-officio secretary of the State Board of Education, and

(10) The State Department of Education.

The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, (however heretofore given) is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in this section. This withdrawal of consent to suits and legal proceedings shall apply not only to suits and legal proceedings filed in the future but also to any pending suits or legal procedure. There is expressly excepted from the foregoing, suits for the enforcement of contracts entered into by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35 of Article III of this Constitution.

This Section shall be self-operative and shall supersede any other portion of this Constitution or any statutes or regulations in conflict herewith. (Act 613 of 1956, adopted November 6, 1956).

LOUISIANA REVISED STATUTES OF 1950.

R. S. 17:443—**Removal of Teachers; Procedure; Right to Appeal.**—A permanent teacher shall not be removed from office except upon written and signed charges of wilful neglect of duty, or incompetency or dishonesty, or of

being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the State of Louisiana, or of advocating or in any manner performing any act toward bringing about integration of the races within the public school system or any public institution of higher learning of the State of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At least fifteen days in advance of the date of the hearing, the school board shall furnish the teacher with a copy of the written charges. The teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at the said hearing. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction.

If a permanent teacher is found guilty by a school board, after due and legal hearing as provided herein, on charges of wilful neglect of duty, or of incompetency, or dishonesty, or of being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the State of Louisiana, or of advocating or in any manner performing any act toward bringing about integration of the races within the public school system of the State of Louisiana, and ordered removed from office, or disciplined by the board, the teacher may, not more than one year from the date of the said finding, petition a court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the mat-

ter. If the finding of the school board is reversed by the court and the teacher is ordered reinstated and restored to duty, the teacher shall be entitled to full pay for any loss of time or salary he or she may have sustained by reason of the action of the said school board. As amended Acts 1956, No. 249, § 1.

ACT 15 OF 1956 (LA. R. S. 17:2131-2135, INCLUSIVE).

"Be it enacted by the Legislature of Louisiana:

"Section 1. No person shall be registered at or admitted to any publicly financed institution of higher learning of this state unless he or she shall have first filed with said institution a certificate addressed to the particular institution sought to be entered attesting to his or her eligibility and good moral character. This certificate must be signed by the Superintendent of Education of the Parish, County, or Municipality wherein said applicant graduated from High School, and by the principal of the High School from which he graduated.

"Section 2. The form of the above referred to certificate shall be prepared by the Department of Education of the State of Louisiana, and a sufficient number thereof shall be furnished to each Superintendent of Education through the State to meet the annual requirements of those seeking admission to the above institutions. He shall furnish sufficient copies thereof to applicants residing outside the State of Louisiana who apply therefor.

"Section 3. Each student graduating from any public High School in the State of Louisiana shall be given

proper notice of the above requirement at the time of his or her graduation; all publicly financed institutions of higher learning shall incorporate in their annual catalogues proper notice that the above referred to certificate is an essential requirement for admission.

"Section 4. Any official or employee of any institution of higher learning financed by the State of Louisiana who admits any student to said institution in violation of the provisions of this Act shall be deemed guilty of committing a misdemeanor and upon conviction thereof shall be fined not more than $500.00 or imprisoned for not more than six months, or both.

"Section 5. The State Board of Education and/or the Board of Supervisors of Louisiana State University & Agricultural & Mechanical College are hereby especially authorized and empowered to adopt such other entrance requirements, including aptitude and medical examinations, as in their judgment may be fit and proper.

"Section 6. All laws or parts of laws in conflict herewith are hereby repealed."

APPENDIX "B".

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION.

No. 16,854

(CIVIL ACTION)

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY & AGRICULTURAL & MECHANICAL COLLEGE, ET AL.,

versus

ARNEASE LUDLEY, AUDREY C. ROBERTSON, ALVERY L. BARNUM, RUTH MAE JOHNSON,

Intervenors.

No. 16,855

(CIVIL ACTION)

LOUISIANA STATE BOARD OF EDUCATION, et al.,

versus

ALMA LARK, et al.,

No. 16,856

(CIVIL ACTION)

LOUISIANA STATE BOARD OF EDUCATION, ET AL.,

versus

JACK BAILEY, ET AL.

Before CHRISTENBERRY and WRIGHT, District Judges.

WRIGHT, District Judge:

This litigation concerns another attempt by the Louisiana Legislature to preserve, by law, segregation in the educational institutions of the state. This attempt, while more subtle than its predecessor,[1] nevertheless fails because the Fourteenth Amendment of the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U. S. 268, 275.

The plaintiffs in these three class actions[2] are now attending various state institutions of higher learning in Louisiana under temporary restraining orders issued by this court.[3] The authorities of these institutions had indi-

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[1] See Bush v. Orleans Parish School Board, 138 F. Supp. 336, aff'd 5 Cir., ... F. (2d) ... (March 1, 1957) 351 U. S. 948.

[2] The jurisdiction of this court is invoked under Section 1311. Title 28, United States Code, this being an action that arises under the Fourteenth Amendment of the Constitution of the United States, Section 1, and Section 1981 of Title 42, United States Code, wherein the matters in controversy exceed the sum and value of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.
The jurisdiction of the court is also invoked under Section 1343, Title 28, United States Code, this being an action authorized by Section 1983, Title 42, United States Code, to be commenced by any citizen of the United States, or other person within the jurisdiction thereof, to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States, Section 1, and Section 1981 of Title 42, United States Code, which provides for the equal rights of citizens and all persons within the jurisdiction of the United States.

[3] It is apparently admitted that the original plaintiff in No. 1833 is now unable to continue at Louisiana State University because of academic difficulties. She maintained a point-hour ratio of 1.3 as against the required point-ratio of 1.5. After the hearing on preliminary injunction, three additional Negro students moved to intervene as parties plaintiff in that action,

(Continued)

cated that the plaintiffs, and all Negroes similarly situated, would be refused registration unless they presented the certificate of eligibility and good moral character signed by their former principals and superintendents as required by Act 15 of 1956[4] of the Louisiana Legislature. Plaintiffs have been unable to obtain the certificate because Act 249 of 1956[5] by the same legislature provides, in effect, that the principals and superintendents will lose their jobs if they sign the certificates.

Plaintiffs, in these proceedings seeking declaratory judgments and injunctive relief, attack the constitutionality of Act 15 of 1956 as well as Act 249 of the same year. Act 15, in pertinent part, provides that "No person shall be registered at or admitted to any publicly financed institution of higher learning of this state unless he or she shall have first filed with said institution a certificate addressed to the particular institution sought to be entered attesting to his or her eligibility and good moral character." The certificate "must be signed by the superintendent of education of the parish, county, or municipality wherein said applicant graduated from high school, and by the principal of the high school from which he graduated." Act 249 of 1956, in pertinent part, provides that "A permanent teacher shall not be removed from office except upon written and signed charges of * * * ad-

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[3] Continued

and their motion to intervene was granted. Since these intervenors were before the court from the inception of this class action because of their being members of the class, and in view of identical issues raised in No. 1833, no useful purpose would be served by a second hearing on the application for preliminary injunction in No. 1833.

[4] La. R. S. 17:2131-35.

[5] La. R. S. 17:443.

vocating or in any manner performing any act toward bringing about integration of the races within the public school system or any public institution of higher learning of the state of Louisiana * * *". Plaintiffs contend that it was the plan of the Louisiana Legislature in passing Acts 15 and 249 of 1956 to prevent the registration of Negroes at institutions designated by it as exclusively for white students by jeopardizing the job of any principal or superintendent who certified eligibility of any Negroes for such institutions.

Defendants contend that Acts 15 and 249 of 1956 are entirely unrelated and must be considered separately. They admit that while there may be some question as to the constitutionality of Act 249, they earnestly contend that there can be no question as to Act 15, which, they say, merely requires a certificate of good character before a student may enter an institution of higher learning in the state. Defendants have also moved to dismiss on the grounds that the case is one for three judges and that the defendants, being state agencies, are immune from suit. These latter contentions were rejected in *Bush v. Orleans Parish School Board*, 138 F. Supp. 336, aff'd 5 Cir., ... F 2d ....., 351 U. S. 948[6] and need not be considered further here.

Since the constitutionality of the two statutes in suit will depend, at least to some extent, on the intention of the Legislature which enacted them, we turn to that consideration. The Louisiana Legislature at its regular session in 1956, without a dissenting vote in either the

[6] The action by the Supreme Court was limited to denial of application for writ of mandamus requiring the convention of a three-judge court.

Senate or House of Representatives, passed thirteen acts designed to maintain separation of the races in schools, in parks and playgrounds, in athletic events, in toilet, eating and drinking facilities, and in waiting rooms for passengers in intrastate commerce. Two of the measures proposed amendments to the State Constitution, the first preventing suits against agencies of the state, such as school boards, without consent of the Legislature, and the second proposing various barriers to voting registration.

This segregation legislation was sponsored by the Joint Legislative Committee on segregation. This Committee was supported during the fiscal year 1955-56 on moneys received from the Board of Liquidation of the State Debt. In his application to the Board for the allotment of the money for the Committee, the Chairman of the Joint Legislative Committee wrote:

> "Although we have strong laws upon our books which will enable the State of Louisiana to make a very strong fight for separation of the races in our public schools, the greater part of our work still lies ahead of us. This committee must aid in coordinating the state's defense of its official policy of segregation, and we must also make studies of every legal and social attack made upon the state's policy in order to formulate any additional legislation that may be needed to preserve, affirm and extend this policy."
>
> (Resolution No. VII, Appropriation No. V; Board of Liquidation of the State Debt, July 7, 1955).

In addition to this statement by the Chairman of the Joint Legislative Committee on segregation, respecting the purpose of segregation legislation generally, there are various other statements[7] referred to in 17 La. L. Rev. 112, indicating that the specific purpose of the two acts in suit is to prevent the registration of Negroes at institutions of higher learning in the state designated as exclusively for white students. These statements show beyond question that it was the intention of the Legislature that any teacher who signs a certificate for a Negro student to go to a white school will sacrifice his tenure.

The legislation has operated in practice pursuant to the intentions of its authors. Not a single principal of a public school or superintendent of a public school system has signed a certificate for a Negro to go to a white school. The combined effect, therefore, of the legislation in suit, Acts 15 and 249 of 1956, is the same as if the Legislature had simply provided, as it did in 1954, "All public * * * schools in the state of Louisiana shall be operated separately for white and colored children."[8] The fact that a transparent device is used, calculated to effect this same result, does not make the legislation less unconstitutional. *Lane v. Wilson, supra; Guinn v. United States*, 238 U. S. 347.

The defendants' earnest suggestion that, irrespective of the constitutionality of Act 249, Act 15 of 1956, merely requiring a certificate of good character for

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[7] There is no legislative history, such as copies of committee reports and floor debates, available on the legislation in suit. The intention of the legislators, however, has been publicly proclaimed again and again.

[8] Act 555 of 1954, La. R. S. 17:331.

admission to a state institution of higher learning is not unconstitutional, is also without merit. Act 15 does not merely require a certificate of good character. It requires a certificate of good character addressed to the particular institution sought to be entered. Addressing a certificate of good character for a Negro to a particular institution, a white institution for example, jeopardizes the job of the principal or superintendent addressing the certificate. Thus Acts 15 and 249 are integrally related. They are both part of the same transparent device. Moreover, the requirement in Act 15 that the certificate be signed by both the principal of the school and the superintendent of education makes assurance doubly sure that no Negro will be able to obtain such a certificate. If, for example, a Negro graduate of a parochial school were successful in obtaining the signature of the principal of his school, such principal not being subject to the state's tenure law, the signature of the parish superintendent of education would still be unavailable because his position would be jeopardized by his signing.

This scheme of dividing discriminatory legislation into two separate acts, one apparently innocuous, was used by the 1954 Louisiana Legislature and was condemned in *Bush v. Orleans Parish School Board, supra. CF. Davis v. Schnell*, 81 F. Supp. 872, aff'd 336 U. S. 933. There a statute,[9] apparently valid on its face, became unconstitu-

[9] Act 556 of 1954, in pertinent part, provided:

"Each Parish Superintendent of Schools, throughout this State, shall each year, determine the particular public school within each Parish to be attended by each school child applying for admission to public schools. No school child shall be entitled to be enrolled or to enter into a public school until he has been assigned thereto in accordance with the provisions of this Act."

tional when applied in tandem with discriminatory legislation.[10] Even considered alone and without reference to Act 249, Act 15 would still be unconstitutional for the reason that the obvious intent of the Legislature in passing the Act was to discriminate against Negro citizens and thus to circumvent the Equal Protection Clause of the Fourteenth Amendment. See *Yick Wo v. Hopkins*, 118 U. S. 356; *Davis v. Schnell, supra.*

Decree to be drawn by the Court.

(Signed) Herbert W. Christenberry
United States
District Judge

(Signed) J. SKELLY WRIGHT
United States
District Judge

New Orleans, Louisiana
April 15th, 1957

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[10] Act 555 of 1954, in pertinent part, provided:

"All public elementary and secondary schools in the state of Louisiana shall be operated separately for white and colored children. This provision is made in the exercise of the State police power to promote and protect public health, morals, better education and the peace and good order in the state and not because of race."

JUDGMENT

No. 16,854
CIVIL ACTION

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY & AGRICULTURAL & MECHANICAL COLLEGE, ET AL

versus

ARNEASE LUDLEY,
AUDREY C. ROBERTSON, ALVERY L. BARNUM,
RUTH MAE JOHNSON,

Intervenors

Filed: April 15, 1957.

Plaintiff's application for a temporary injunction was heard by this court. For the reasons expressed in the separate opinion this day rendered:

IT IS ORDERED, ADJUDGED AND DECREED that a temporary injunction be, and the same is hereby, issued in this matter against Board of Supervisors of Louisiana State University and Agricultural and Mechanical College: Mrs. Marguerite Dixon, Lewis Gottlieb, Sterling Gladden, George Baillo, Theodore Cangelosi, John J. Dokes, C. J. Dugas, Tom Dutton, Thomas W. Leigh, Joseph C. Lesage, Joseph Smitherman, Horace Wilkinson, Jr., Percy L. Roberts, Mrs. Ella V. Andrich Schwing, Members of the Board of Supervisors, and Troy H. Middleton, President, their agents, servants, employees, successors in office and those in concert with them who shall receive notice of this order, restraining and enjoining them, pending the de-

termination of this action, from refusing to admit any qualified applicant to Louisiana State University and Agricultural and Mechanical College for the purpose of pursuing a course of study offered by that university because of failure of the applicant to present the certificate of eligibility provided in La. R. S. 17:2131-35.

IT IS FURTHER ORDERED that copy of this judgment be served upon each of the said defendants.

(Signed) Herbert W. Christenberry
United States
District Judge

(Signed) J. SKELLY WRIGHT
United States
District Judge

New Orleans, Louisiana
April 15th, 1957

OPINION OF THE COURT FILED

February 13, 1958.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,854

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY & AGRICULTURAL & MECHANICAL COLLEGE, ET AL.,
Appellants,

versus

ARNEASE LUDLEY, ET AL.,
Appellees.

No. 16,855

LOUISIANA STATE BOARD OF EDUCATION, ET AL.,
Appellants,

versus

ALMA LARK, ET AL.,
Appellees.

No. 16,856

LOUISIANA STATE BOARD OF EDUCATION, ET AL.,
Appellants,

versus

JACK BAILEY, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

February 13, 1958.

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: These three appeals are from orders granting a temporary injunction forbidding the defendants, Louisiana State Board of Education and Board of Supervisors of Louisiana State University, to deny to any qualified applicant registration in three state institutions of higher education "because of failure of the applicant to present the certificate of eligibility," provided in a newly enacted Louisiana statute. The statute forbade, under penalty of a $500 fine for the officer ignoring its provision, any such institution to permit any student to register without filing a certificate "addressed to the particular institution sought to be entered" attesting to his eligibility and good moral character, such certificate to be signed by the superintendent of education of the Parish, County or municipality wherein said applicant graduated from high school, and by the principal of the high school from which he graduated."[1] It will be noted that the order of the trial court was for the benefit of all applicants for admission, thus giving recognition to the right of the individual plaintiffs to represent others in these class suits.

The trial court, after having granted temporary restraining orders under which the named plaintiffs were admitted to enrollment, consolidated the three cases for hearing on the interlocutory injunction. As they all present the same basic questions we shall treat them together, except to say that as to the intervening plaintiffs in No. 16,854, the court correctly decided that they could become parties to the suit.

The grounds for appeal here are: (1) These are suits against the State and may not be maintained in the

[1] Act No. 15, 1956, La. R. S. 17:2131 et seq.

federal court; (2) The suits attack state statutes as being unconstitutional, and therefore they should have been tried by a three-judge federal court rather than by a district court of one judge; (3) The Louisiana statute requiring the certificate of eligibility and character is not unconstitutional; (4) The evidence used to determine legislative intent was inadmissible; (5) The injunction should not have been granted without bond.

The able trial judges[2] dealt capably with the merits of the issue of constitutionality of the law. Their opinion is published at 150 F. Supp. 900. The views there expressed are adopted by us and need elaboration on one point only. This statute reposes in two named officials, a high school principal and a parish school superintendent the unfettered and uncontrolled power to grant or deny to a high school graduate the right to enter a college or university in Louisiana. It sets up no standards and expresses no outline of qualifications which are to guide these officials in the granting or withholding of the students' right to go to a state supported college or university. In *Orleans Parish School Board v. Bush*, 5 Cir., 242 F. 2d 156, 164, we said:

> "Attempts by statute to give any official the power to assign students to schools arbitrarily according to whim or caprice are legally impermissible."

How much less permissible is it for a state by statute to say that a student must obtain the certificate of two named officials to entitle him to enter a tax supported educational institution where no objective standard is set by which the arbitrariness of the judgment of such of-

[2] Chief Judge Christenberry and Judge Wright, of the District Court for the Eastern District of Louisiana, sat en banc.

ficials in denying a certificate can be tested? The very absence of such standards condemns the statute as providing, by clearest implication, as the only standard: that of whether a Negro student seeks a certificate to a Negro college or seeks one to a white college. How more patently could this standard be expressed than the requirement that the certificate be not a certificate attesting to the eligibility and good character of the student generally, but that it be a certificate "addressed to the particular institution sought to be entered." The sophistry that produces such a patently void device stands out in stark outline in the pathetic effort of one high school principal to answer the request of a Negro student, the named plaintiff here, for a certificate of eligibility to enter Louisiana State University.

"Miss Arnease Ludley
208 West McKinley Street
Baton Rouge, Louisiana

Dear Miss Ludley:

Your request for a Certificate of Eligibility to attend Louisiana State University is hereby acknowledged. In reply I do not have a form of the Certificate of Eligibility addressed to that institution. If you should get a form and send it to me, I could not sign it, because under a state law, I would lose my job for signing the certificate.

I assure you that my refusal to sign the certificate is not intended to cast any unfavorable reflection against your character. I just can not take the risk of losing my job.

Sincerely yours,

(Signed) Arthur D. Smith
Principal"

Here a Negro school principal felt that he could not afford to sign a certificate of good character for one of his graduates because it was addressed to the State University, a "white" school, but conscious of the danger of such refusal to the reputation of the student, he felt constrained to tell her that his refusal to give her a certificate of good character was not to be taken as reflecting on her character at all. So, too, was the standard of race or color recognized by a white parish school superintendent who wrote:

"Mildred M. Meyers
Post Office Box 245
Hammond, La.

Dear Student:

In reply to your letter of January 17, I wish to say that neither Professor Davis nor I are permitted by law to sign certificates of eligibility for you to go to Louisiana State University, or one of the teachers colleges for white students.

We are permitted, however, to sign certificates for you to attend Grambling or Southern College. I feel sure that you are familiar with the provisions of this state law. If you wish us to sign certificates for either Grambling or Southern College we shall be glad to do so.

With best wishes, I am

Yours very truly,

(Signed) J. F. Corkern
Superintendent"

Here, in plainest terms, the parish school superintendent says that the student's eligibility and moral char-

acter are good enough for a Negro college but, by arbitrary classification, are not good enough for the white State university. Whatever other standards may be prescribed as a basis for the obtaining of a certificate of eligibility and good character, race or color may not be used. This has been finally decided in *Brown v. Board of Education of Topeka, Kan.*, 347 U. S. 483, and related cases. As we said in Orleans Parish Board of Education, in discussing the absence of any ascertainable standards for the action of the school officials there: "Such a statute is unconstitutional either because it has on its face the effect of depriving appellees of their liberty or property without due process of law (the failure to provide reasonable standard for testing the arbitrariness of an official act in assigning pupils to schools) or having implied as its only basis for assignments the prohibited standard of race." The same fault condemns this law. Either it attempts to give designated officials the power to exclude students from all state supported colleges without establishing objective standards which they can seek to satisfy or it implies the standard (which was the one recognized by the two authors of the above quoted letters) of race or color. The requirement in La. Rev. St. 17:2131-2135, that a student have a certificate of eligibility and good moral character addressed to a particular institution is in conflict with the Fourteenth Amendment to the Federal Constitution and must fall.

This conclusion is sufficient to condemn the statute without reference to the companion law adopted by the same legislature which denies teachers' tenure protection to any teacher (it was frankly admitted by appellant's

counsel that this would apply to high school principals found guilty of "advocating or in any manner bringing about integration of the races within the public school system or any public institution of higher learning of the State of Louisiana. . . ."[3] The bearing that the law has on the reluctance of a high school principal to sign a certificate of good character for a Negro student addressed to a "white" college is obvious. It was so effective, said the trial court, that "not a single principal of a public school or superintendent of a public school system has signed a certificate for a Negro to go to a white school." The courts can, of course, consider the two statutes together in seeking to find the legislative intent. *Orleans Parish School Board v. Bush, supra.*

The contention by appellants that these were suits against the State of Louisiana has been fully answered in *Orleans Parish Board of Education v. Bush*, and we would not need to answer it further if it were not for the contention here by the state that the adoption of an amendment to Article XIX, Sect. 26, of the state constitution makes certain officials, including the defendants here, "special agencies of the State of Louisiana" and seeks to withhold the consent of the State of Louisiana to suits against it through suits against such officials. The determination as to whether a suit in a federal court against a state officer is a suit against the state and is thus prohibited by the Fourteenth Amendment is for the federal court to determine. In the recently decided case of *Staub*

[3] Act No. 249, 1956, La. R. S. 17:443.

v. City of Baxley, U. S. , No. 48, October Term, 1957, Jan. 13, 1958, the Supreme Court quoted from *First Natl. Bank v. Anderson*, 269 U. S. 341, 346:

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the constitution or law of the United States, is necessarily a question of federal law."

The Court then said:

> "As Mr. Justice Holmes said in Davis v. Weschler, 267 U. S. 22, 'Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice'."

These suits are not suits against the State of Louisiana, and no amount of assertion that they are can make them so. Full relief can be obtained from the named defendants without requiring the state to take any affirmative action. This is the test. See, for our discussion of this point, *Orleans Parish School Board v. Bush*, *supra*, at page 160.

As to the complaint that the injunction could be granted only by a three judge federal court, we repeat that the trial judges said: This contention was rejected in *Orleans Parish School Board v. Bush*, *supra*. There, as here, acts of the Louisiana state legislature and a provision of the Louisiana constitution were attacked as being in conflict with the constitution. The injunction was issued by a

district court of a single judge and this was affirmed on appeal to this Court, and the Supreme Court denied certiorari, 254 U. S. 921, and also denied a petition for mandamus to compel the creation of a three judge court to hear the case, 351 U. S. 948. It is apparent that the requirement for the appointment of a three judge court does not apply in litigation in which there can be no real dispute as to the question of constitutionality that is drawn in issue by the suit seeking the injunction. There can be no real dispute where each separate element on which the state relies to support the constitutionality of a statute has been clearly and definitely put at rest by the Supreme Court contrary to the contention of the state. Such is the case here.

We come finally to the criticism of the trial court's considering the statements of state officials, including the members of the state legislature and its committees in construing the true meaning and intent of the statute. Although we have indicated above that this evidence was not required to support the court's ruling, nevertheless we do affirm the action of the trial court in construing the law in the light in which everyone else in the state construed it. This precise question was before the three-judge district court in *Davis v. Schell*, 81 F. Supp. 872, where the issue was as to the constitutionality of the "Boswell amendment" to the Alabama constitution. The court strongly relied on the "history of the period immediately preceding the adoption of the Boswell amendment" in striking down the amendment as being designed to discriminate against Negro voters. This decision was affirmed without opinion by the Supreme Court, 336 U. S. 933.

Little need be said as to the claim that the district court should have required bond for the granting of the temporary injunction. The requirement of bond in Rule 65(c) F.R.C.P. is only for such security "as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Apparently the trial court did not deem it proper to require security under the circumstances found to exist. The same point was made without success in *Board of Supervisors of Louisiana State University v. Tureaud*, 5 Cir., 225 F. 2d 434, as indicated in the dissenting opinion, 228 F. 2d 895, 901. Moreover, this point was not urged in the court below and need not be considered on this appeal.

The judgments of the trial court are AFFIRMED.

HUTCHESON, Chief Judge, Concurring specially:

I am in complete accord with all that is said, as well as all that is held, in the main opinion affirming the order granting a temporary injunction. Because, however, of the arguments of appellants that the record contains affidavits counter to those submitted on behalf of appellees and that on a trial the proof would show that the complained of statute has been administered impartially, uniformly and without regard to race or color, and because of the fact that, though the temporary injunction was issued on April 15, 1957, no effort has been made by the defendants to bring the cause to trial on its merits, I feel that it is necessary to call attention to the fact that this case is not before us on the merits by referring to what was said at length in *Mansfield Hardwood Lumber Co. v. Johnson*, 242 F. (2) 45. This is that, though the appeal

from an interlocutory injunction did not bring up the cause as a whole and that "the case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken unless otherwise ordered",[1] the defendants, instead of pressing the cause to trial on its merits and then, if they lost, bringing them up, in effect are here arguing the case as though it were an appeal from a final decision on the merits.

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[1] Ex Parte Natl. Enameling & Stamping Co., 201 U. S. 156; Lea v. Vasco Pro., Inc. 81 F. (2d) 1011; Douglass v. Pan-American Bus Lines, 81 F. (2d) 222.

JUDGMENT.

Extract from the Minutes of February 13, 1958.

No. 16,854

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY & AGRICULTURAL & MECHANICAL COLLEGE, ET AL.,

versus

ARNEASE LUDLEY, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellants, Board of Supervisors of Louisiana State University & Agricultural & Mechanical College, and others, and the surety on the appeal bond herein, Aetna Insurance Company of Hartford, Connecticut, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Chief Judge, concurring specially."

ORDER DENYING REHEARING.

Extract from the Minutes of March 28, 1958.

No. 16,854

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY & AGRICULTURAL & MECHANICAL COLLEGE, ET AL.

versus

ARNEASE LUDLEY, ET AL.

No. 16,855

LOUISIANA STATE BOARD OF EDUCATION, ET AL.

versus

ALMA LARK, ET AL.

No. 16,856

LOUISIANA STATE BOARD OF EDUCATION, ET AL.

versus

JACK BAILEY, ET AL.

It is ordered by the Court that the petition for rehearing filed in these causes be, and the same is hereby, denied.